U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12380

Date: SEPT. 3, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a Montessori school, seeks to permanently employ the Beneficiary as an instructional coordinator. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that: (1) the Petitioner did not establish its ability to pay the proffered wage; and (2) the Beneficiary was not eligible to port to a new employer under section 204(j) of the Act, 8 U.S.C. § 1154(j).[1]

The Petitioner bears the burden to establish eligibility for the requested immigration benefit. See section 291 of the Act, 8 U.S.C. § 1361. We will reject the appeal.

This appeal was filed by the Beneficiary of the petition.[2] An appeal may only be filed by an affected party. 8 C.F.R. § 103.3(a)(2)(i). An affected party is a party with standing in a proceeding. 8 C.F.R. § 103.3(a)(1)(iii)(B). Under USCIS regulations, the beneficiary of an immigrant visa petition is not an affected party.[3] 8 C.F.R. § 103.3(a)(1)(iii)(B). If an appeal is filed by a party that does not have standing, the appeal must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v).

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[1] This provision was enacted from section 106(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21). The AC21 portability provision allows a beneficiary of a valid employment-based immigrant visa petition, whose adjustment of status application has been pending for at least 180 days, to change the intended job or employer if the new position is in the same or similar occupation, without requiring a new labor certification and Form I-140 petition.

[2] The Form I-290B, Notice of Appeal or Motion, and the accompanying cover letter do not clearly state whether the Petitioner or the Beneficiary filed this appeal. The Form I-290B was only signed by counsel. However, the brief in support of the appeal states that the Petitioner has not been in business since 2014 and the Beneficiary is the party filing the appeal. Since the Petitioner is no longer doing business, it cannot establish its continuing ability to pay the proffered wage under 8 C.F.R. § 204.5(g)(2).

[3] There is a limited exception for certain beneficiaries of petitions in revocation proceedings. See Matter of V-S-G- Inc., Adopted Decision 2017-06 (AAO Nov. 11, 2017). For the reasons explained below, this narrow exception does not apply to this appeal.

The Beneficiary claims that she has standing in this proceeding because the Director did not provide her with the opportunity to respond to the Director's RFE prior to the denial of the petition. In support of this claim, the Beneficiary cites to Ilyabaev v. Kane, 847 F. Supp 1168 (D. Ariz. 2012).[4] In Ilyabaev, the court concluded that it had jurisdiction over a due process claim because USCIS did not give notice to the beneficiary prior to the revocation of the immigrant visa petition filed on her behalf. This case is distinguishable because Ilyabaev involves the revocation of a previously approved Form I-140 petition, whereas this case is an appeal of a Form I-140 petition denial.[5] Further, Ilyabaev addresses standing in federal litigation as opposed to an immigration benefit request before USCIS.[6]

We addressed the issue of beneficiary standing in Matter of V-S-G- Inc., Adopted Decision 2017-06 (AAO Nov. 11, 2017), where we held that beneficiaries of valid employment-based immigrant visa petitions who are eligible to change jobs or employers and who have properly requested to do so under section 204(j) of the Act are affected parties for revocation proceedings. In that decision, we explicitly declined to expand beneficiary standing to other circumstances. See id. at *11.

In this case, the immigrant visa petition filed on behalf on the Beneficiary has not been approved and is not subject to revocation proceedings. Therefore, under Matter of V-S-G-, the Beneficiary is not treated an affected party in this proceeding. Since the Beneficiary is not an affected party, we must reject the appeal as improperly filed under 8 C.F.R. § 103.3(a)(2)(v).

The Beneficiary is not an affected party in this proceeding. Therefore, she is not eligible to file an appeal.

ORDER: The appeal is rejected.

[4] We consider relevant district court decisions, but they are not binding and hence do not control the outcome of this appeal. See Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) ("'A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.'") (quoting 18 J. Moore, et al., Moore's Federal Practice § 134.02[1][d], p. 134-26 (3d ed. 2011)); see also Matter of K-S-, 20 I&N Dec. 715 (BIA 1993) (district court decisions are not binding on the BIA other than in the case before it).

[5] In addition, the Ilyabaev decision addressed the beneficiary's work experience. In this case, the basis of the denial is the employer's ability to pay the proffered wage, which would require evidence from the Petitioner. See 8 C.F.R. § 204.5(g)(2).

[6] Courts have noted that the ability to sue in federal court is distinct from the ability to pursue immigration benefits in administrative proceedings before USCIS. See, e.g., Mantena v. Johnson, 809 F.3d 721, 732 (2d Cir. 2015) (citing Kurapati v. USCIS, 732 F.3d 1255, 1260 (11th Cir. 2014)).